EDITOR'S NOTE

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99-5201 (2)

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUL 16 1999
OFFICE OF THE CLERK

OCTOBER TERM, 1998

NO. _____

CAREY DEAN MOORE,

Petitioner,

vs.

STATE OF NEBRASKA,

RECEIVED
JUL 16 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Respondent.

CAPITAL CASE

MOTION TO FILE PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

Petitioner, Carey Dean Moore, is on Nebraska death row. His attorney, Edward F. Fogarty, was appointed May 7, 1997, by the District Court of Douglas County, Nebraska, to represent him in an appeal to the Nebraska Supreme Court. Since his crimes were committed in 1979, he has had only court appointed counsel: Douglas County Public Defender for trial and appeal, private appointed attorney for his first state post conviction proceeding; the federal courts have appointed three private attorneys to represent him in a habeas corpus proceeding starting in 1984 and

10 66 pp

ending in 1992, Public Defender for resentencing and appeal, and Edward F. Fogarty for appeal from his post conviction relief motion denied by the Douglas County District Court on May 5, 1997.

Moore's Affidavit is attached showing he is indigent.

Petitioner asks the Court to allow him to file his Petition for a Writ of Certiorari in forma pauperis.

CAREY DEAN MOORE, Petitioner,

by Ed Fogarty 7/5/99

Edward F. Fogarty NE #11337
FOGARTY, LUND & GROSS
1904 Farnam Street, Suite 700
Omaha, Nebraska 68102
(402) 341-3333

and

Larry W. Myers NE #12999
10808 Prairie Hills Drive
Omaha, Nebraska 68144
(402) 391-2200

Attorneys for Petitioner.

ATTACHMENTS

1. Carey Dean Moore's Affidavit
2. Nebraska Penitentiary Prisoner's Account Statement

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

NO. _____

CAREY DEAN MOORE,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

CAPITAL CASE

AFFIDAVIT ACCOMPANYING PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers to this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Date: July 15, 1999.

Carey Dean Moore
Carey Dean Moore

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

On the 13-14 day of July, 1999, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Carey Dean Moore, to me known to be the person who executed the foregoing and acknowledged the execution thereof to be his voluntary act and deed.

WITNESS my hand and notarial seal the day and year first above written.

GENERAL NOTARY-State of Nebraska
FRANCISCO R. DELGADO
My Comm. Exp. Dec. 12, 2000

Francisco R. DelGado
Notary Public

My issues on appeal are: Whether or not executing me now almost twenty years after my crimes and nineteen years after my initial death sentence constitutes cruel and unusual punishment where over half the delay is due to intentional and/or negligent actions of the State (essentially unsuccessful appeals by the State) that had the obvious consequence of delaying the execution for years.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was recevied weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

I am Single.

Income source	Average monthly amount during the past 12 months	Amount expected next month
	You	You
Employment	$ 12.00 Prison	$ 12.00
Self-employment	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0
Interest and dividends	$ 0	$ 0
Gifts	$ 50.00 mth. *	$ 50.00
Alimony	$ 0	$ 0
Child support	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0
Unemployment payments	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0
Other (specify):	$ 0	$ 0
Total monthly income:	$ 62	$ 62.00

* Earn a friend for the last 6 months or so, may or may not continue.

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
Nebraska	Prison	6-20-1958	+ DRE stand

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
N/A Spouse	Single		

4. How much cash do you and your ~~spouse~~ have? $ under $10.00

Below, state any money you or your ~~spouse~~ have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
0		$	$
		$	$
		$	$

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home (Value)	Other real estate (Value)	Motor vehicle #1 (Value)
N/A		Make & year:
		Model:
		Registration #:

Motor vehicle #2 (Value)	Other assets (Value)	Other assets (Value)
Make & year: N/A		
Model:		
Registration #:		

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A		

7. State the names of persons who rely on you or your spouse for support.

Name	Relationship	Age
None		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

No spouse. No family

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 0	$
Are real-estate taxes included? ☐ Yes ☐ No		
Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and Telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 0	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in Mortgage payments)	$ 0	$
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other:	$ 0	$

Taxes (not deducted from wages or included in Mortgage payments) (specify):	$ 0	$
Installment payments	$ 0	$
Motor Vehicle	$ 0	$
Credit card (name):	$ 0	$
Department store (name):	$ 0	$
Other:	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): Hygeine and Postage - Envelopes / Candy / Chips / Cakes	$ 30.00 - $35.00 monthly.	$
Total monthly expenses:	$	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?
☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid—or will you be paying—an attorney any money for services in connection with this case, including the completion of this form? Yes No
If yes, how much? $_____
If yes, state the attorney's name, address, and telephone number:
_____
_____
_____

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?
☐ Yes ☒ No
If yes, how much? $_____

If yes, state the person's name, address, and telephone number: N/A

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

I have been incarcerated since ~~6-30-9~~ Aug. 1979

13. State the address of your legal residence.

P.O. Box 2500

Lincoln NE 68542

Your daytime phone number: None

Your age: 41 Your years of schooling: 10th

Your social-security number: 506-78-6200

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES
Harold W. Clarke
Director

Mike Johanns
Governor

CERTIFICATION

STATE OF NEBRASKA
DEPARTMENT OF CORRECTIONAL SERVICES

I, Inga L. Hookstra, Accounting/Finance Manager, hereby certify that the attached is a true and correct copy of the monthly account transactions for the account of Carey Dean Moore, #32947, for the 6 month period from January, 1999 to June, 1999 consisting of 6 pages. Accountings for fractional portions of months are not available.

Dated this 14th day of July, 1999.

Inga L. Hookstra
Administrator of Inmate Accounting

(SEAL)

P.O. Box 94661 • Lincoln, Nebraska 68509-4661 • Phone (402) 471-2654
An Equal Opportunity/Affirmative Action Employer
printed on recycled paper

ID NUMBER	NAME	DATE REC	INST RELEASE	REC CTR	LOCALITY	LAST ACTIVITY
32947	MOORE/CAREY D.	06/20/80		NSP	4D 18	06/30/99

SSN	PREV ID	GATE	HR ASSIGNMENT	DATE	IST	CNF	MNT	RST	SAV	SEC	SUS	LEG
506786200		.00	AD UNASSIGNED	01/11/99	O	O		O	O		O	
					N	N		N	N		N	

PROL	VIOL	DET	BEGIN BAL	BEG UNFR BAL	CURR FR BAL	CURR UNFR BAL	CURR BAL
		N	.14	.14	.00	5.34	5.34

TRAN CODE	TRAN DATE	DOC NUMBER	DESCRIPTION	FROZEN AMOUNT	DEBIT	CREDIT	BALANCE
03231	060299	158644	DAVID MOORE			230.00	230.14
03101	060399	052899	NBC BANK		200.00		30.14
03801	060499	003060	STORE 02 CHARGES		11.78		18.36
03231	060899	158893	FELION/MARILYN			25.00	43.36
03801	060999	006325	STORE 02 CHARGES		3.39		39.97
03101	060999	060799	NBC BANK/INSUFF.				39.97
03231	060999	158991	DOWDY/DALE			70.00	109.97
03231	060999	159016	MYERS/LARY			50.00	159.97
03801	061199	008099	STORE 02 CHARGES		5.16		154.81
03101	061499	060999	NBC BANK		56.00		98.81
03801	061699	011191	STORE 02 CHARGES		7.16		91.65
03101	061799	061199	NBC BANK		90.97		.68
03231	061799	159321	CLARK/JACKIE			5.00	5.68
01001	061799	159321	UNFR 1999-06-30	5.00			.68
03801	061899	012806	STORE 02 CHARGES		.36		.32
03302	062299	012131	372 5-1/5-31-99			10.00	10.32
03801	062399	015993	STORE 02 CHARGES		8.24		2.08
03801	062599	018004	STORE 02 CHARGES		1.74		.34
01001	063099		UNFREEZE PERS. CHECK	5.00-			5.34

ID NUMBER	NAME	DATE REC	INST RELEASE	REC CTR	LOCALITY	LAST ACTIVITY
32947	MOORE/CAREY D.	06/20/80		NSP	4D 18	05/27/99

SSN	PREV ID	GATE	HR ASSIGNMENT	DATE	IST	CNF	MNT	RST	SAV	SEC	SUS	LEG
506786200		.00	AD UNASSIGNED	01/11/99	O	O		O	O		O	
					N	N		N	N		N	

PROL	VIOL	DET	BEGIN BAL	BEG UNFR BAL	CURR FR BAL	CURR UNFR BAL	CURR BAL
		N	.87	.20	.00	.14	.14

TRAN CODE	TRAN DATE	DOC NUMBER	DESCRIPTION	FROZEN AMOUNT	DEBIT	CREDIT	BALANCE
03231	051199	157901	MYERS/LARRY			50.00	50.20
01012	051199		FRZ/UNFRZ SUSPENSE	1.21			48.99
03801	051299	005997	STORE 02 CHARGES		3.42		45.57
03101	051399	050799	NBC BANK		45.00		.57
03801	051499	007599	STORE 02 CHARGES		.30		.27
03302	051999	012130	372/58 4-1/4-30-99			10.00	10.27
03801	051999	010397	STORE 02 CHARGES		5.94		4.33
03801	052199	012335	STORE 02 CHARGES		2.75		1.58
03801	052699	015961	STORE 02 CHARGES		1.44		.14
01012	052799		FRZ/UNFRZ SUSPENS	1.88-			2.02
03702	052799		NSP/PSTG		.67		1.35
03702	052799		NSP/PSTG		1.21		.14

ID NUMBER	NAME	DATE REC	INST RELEASE	REC CTR	LOCALITY		LAST ACTIVITY
32947	MOORE/CAREY D.	06/20/80		NSP	4D	18	04/28/99

SSN	PREV ID	GATE	HR ASSIGNMENT	DATE	IST	CNF	MNT	RST	SAV	SEC	SUS	LEG
506786200		.00	AD UNASSIGNED	01/11/99	O	O		O	O		O	
					N	N		N	N		N	

PROL	VIOL	DET	BEGIN BAL	BEG UNFR BAL	CURR FR BAL	CURR UNFR BAL	CURR BAL
		N	994.61	994.61	.67	.20	.87

TRAN CODE	TRAN DATE	DOC NUMBER	DESCRIPTION	FROZEN AMOUNT	DEBIT	CREDIT	BALANCE
03101	040199	033199	NBC BANK		990.00		4.61
03801	040299	000426	STORE 02 CHARGES		3.75		.86
03801	040799	002238	STORE 02 CHARGES		.60		.26
03101	040899	040599	NBC BANK/NSF				.26
03231	040899	156780	MYERS/LARY			50.00	50.26
03302	041699	012129	372/58 3-1/3-31-99			69.75	120.01
03801	041699	006330	STORE 02 CHARGES		36.90		83.11
03231	042099	157175	CROSS/GARY			30.00	113.11
01012	042199		FRZ/UNFRZ SUSPENSE	.67			112.44
03231	042299	034255	NATIONAL BANK OF COM			890.00	1002.44
03801	042399	009410	STORE 02 CHARGES		1.34		1001.10
03101	042799	042299	H. DAVID MOORE/SUP		1000.01		1.09
03801	042899	011457	STORE 02 CHARGES		.89		.20

ID NUMBER	NAME	DATE REC	INST RELEASE	REC CTR	LOCALITY		LAST ACTIVITY
32947	MOORE/CAREY D.	06/20/80		NSP	4D	18	03/31/99

SSN	PREV ID	GATE	HR ASSIGNMENT	DATE	IST	CNF	MNT	RST	SAV	SEC	SUS	LEG
506786200		.00	AD UNASSIGNED	01/11/99	O	O		O	O		O	
					N	N		N	N		N	

PROL	VIOL	DET	BEGIN BAL	BEG UNFR BAL	CURR FR BAL	CURR UNFR BAL	CURR BAL
		N	51.74	50.52	.00	994.61	994.61

TRAN CODE	TRAN DATE	DOC NUMBER	DESCRIPTION	FROZEN AMOUNT	DEBIT	CREDIT	BALANCE
03801	030399	000824	STORE 02 CHARGES		7.43		43.09
03231	030399	155383	TAMMY BANKS			10.00	53.09
03101	030499	022699	NBC BANK		41.00		12.09
03231	030499	155465	THERHILDSEN/MARY			10.00	22.09
01012	030499		FRZ/UNFRZ SUSPENSE	8.60			13.49
03801	030599	002244	STORE 02 CHARGES		1.63		11.86
03101	030999	030399	TV GUIDE		9.96		1.90
03801	031099	003989	STORE 02 CHARGES		1.50		.40
01012	031599		FRZ/UNFRZ SUSPENS	1.22-			1.62
03706	031599		TAXABLE COPIES		1.20		.42
03801	031599		STORE ## CHARGES		.02		.40
03801	031799	007157	STORE 02 CHARGES		.30		.10
03302	031799	012128	372 2-1/2-28-99			10.00	10.10
03231	031899	156014	MYERS/LARY			100.00	110.10
03801	031999	008446	STORE 02 CHARGES		18.15		91.95
01012	032399		FRZ/UNFRZ SUSPENS	8.60-			100.55
03702	032399		NSP/PSTG		8.60		91.95
03801	032499	010511	STORE 02 CHARGES		5.85		86.10
03801	033199	013757	STORE 02 CHARGES		9.39		76.71
03801	033199	013851	STORE 02 CHARGES		2.10		74.61
03231	033199	034140	NATIONAL BANK OF COM			920.00	994.61

DEPA .NT OF CORRECTIONAL SERVICES
ACCOUNTING
INSTITUTIONAL ACCOUNT STATEMENT
FOR THE MONTH ENDING FEBRUARY 28, 1999

ID NUMBER	NAME	DATE REC	INST RELEASE	REC CTR	LOCALITY	LAST ACTIVITY
32947	MOORE/CAREY D.	06/20/80		NSP	4D 18	02/26/99

SSN	PREV ID	GATE	HR ASSIGNMENT	DATE	IST	CNF	MNT	RST	SAV	SEC	SUS	LEG
506786200		.00	AD UNASSIGNED	01/11/99	O	O		O	O		O	
					N	N		N	N		N	

PROL	VIOL	DET	BEGIN BAL	BEG UNFR BAL	CURR FR BAL	CURR UNFR BAL	CURR BAL
		N	1.35	.11	1.22	50.52	51.74

TRAN CODE	TRAN DATE	DOC NUMBER	DESCRIPTION	FROZEN AMOUNT	DEBIT	CREDIT	BALANCE
03231	020299	154264	EISELE/GEORGE			30.00	30.11
03231	020299	154270	MYERS/LARY			50.00	80.11
03801	020399	000843	STORE 02 CHARGES		20.95		59.16
03801	020599	002229	STORE 02 CHARGES		9.38		49.78
03231	020599	154374	MOORE/DAVID			40.00	89.78
03101	020899	020499	NBC BANK/NSF				89.78
01012	020899		FRZ/UNFRZ SUSPENS	.02-			89.80
03801	020899		NSP/CANT.#2 PSTG		.02		89.78
03231	020899	154460	CLARK/JACKIE			10.00	99.78
03231	020999	154533	FELION/MARYLYN			20.00	119.78
03801	021099	004130	STORE 02 CHARGES		4.18		115.60
03101	021199	020999	NBC/SAVINGS		21.00		94.60
03101	021199	020499	NBC/SAVINGS		90.00		4.60
03801	021299	005249	STORE 02 CHARGES		3.87		.73
03801	021299	005251	STORE 02 CHARGES		.66		.07
03302	021799	012127	NSP/ 1-1/1-31-99			10.00	10.07
03801	021999	008145	STORE 02 CHARGES		7.36		2.71
03801	022499	010034	STORE 02 CHARGES		2.19		.52
03231	022699	155256	MYERS/LARY			50.00	50.52

DEPA .NT OF CORRECTIONAL SERVICES
ACCOUNTING
INSTITUTIONAL ACCOUNT STATEMENT
FOR THE MONTH ENDING JANUARY 31, 1999

ID NUMBER	NAME	DATE REC	INST RELEASE	REC CTR	LOCALITY	LAST ACTIVITY
32947	MOORE/CAREY D.	06/20/80		NSP	4D 18	01/27/99

SSN	PREV ID	GATE	HR ASSIGNMENT	DATE	IST	CNF	MNT	RST	SAV	SEC	SUS	LEG
506786200		.00	AD UNASSIGNED	01/11/99	O	O		O	O		O	
					N	N		N	N		N	

PROL	VIOL	DET	BEGIN BAL	BEG UNFR BAL	CURR FR BAL	CURR UNFR BAL	CURR BAL
		N	82.43	82.43	1.24	.11	1.35

TRAN CODE	TRAN DATE	DOC NUMBER	DESCRIPTION	FROZEN AMOUNT	DEBIT	CREDIT	BALANCE
03801	010599	000422	STORE 02 CHARGES		6.00		76.43
03101	010599		NBC/SAV		50.00		26.43
03231	010799	153409	KREMER/KENNETH			5.00	31.43
01001	010799	153409	UNFR 1999-01-21	5.00			26.43
03801	011399	004219	STORE 02 CHARGES		3.21		23.22
01012	011499		FRZ/UNFRZ SUSPENSE	.02			23.20
03101	011499	010799	NBC BANK		20.00		3.20
03801	011599	005535	STORE 02 CHARGES		2.47		.73
03302	012099	012125	372-58 12-1/12-31-98			69.75	70.48
03801	012099	007088	STORE 02 CHARGES		.72		69.76
01001	012199		UNFREEZE PERS. CHECK	5.00-			74.76
03101	012199	011999	NBC BANK		50.09		24.67
03801	012299	008361	STORE 02 CHARGES		9.84		14.83
01012	012599		FRZ/UNFRZ SUSPENSE	1.20			13.63
01012	012699		FRZ/UNFRZ SUSPENSE	.02			13.61
03801	012799	010547	STORE 02 CHARGES		13.50		.11

98-5241
Moore

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

NO. _____

CAREY DEAN MOORE,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

CAPITAL CASE

Petition for a Writ of Certiorari to the
Supreme Court of Nebraska

PETITION FOR WRIT OF CERTIORARI

Edward F. Fogarty
FOGARTY, LUND & GROSS
1904 Farnam Street, Suite 700
Omaha, Nebraska 68102
(402) 341-3333

and

Larry W. Myers
10808 Prairie Hills Drive
Omaha, Nebraska 68144
(402) 391-2200
Attorneys for Petitioner

CAPITAL CASE

QUESTION FOR REVIEW

Whether or not executing Moore now almost twenty years after his crimes and nineteen years after his initial death sentence constitutes cruel and unusual punishment where over half the delay is due to intentional and/or negligent actions of the State (essentially unsuccessful appeals by the State) that had the obvious consequence of delaying the execution for years.

PARTIES AND ATTORNEYS

The Petitioner is Carey Dean Moore, Nebraska State Penitentiary, P.O. Box 2500, Lincoln, Nebraska 68542, Phone: (402) 471-3161.

The Petitioner is represented by:

Edward F. Fogarty
FOGARTY, LUND & GROSS
1904 Farnam Street, Suite 700
Omaha, Nebraska 68102
(402) 341-3333

and

Larry W. Myers
10808 Prairie Hills Drive
Omaha, Nebraska 68144
(402) 391-2200

(Mr. Fogarty is a member of the bar of the United States Supreme Court, having been admitted in late 1965 or early 1966.)

The Respondent, State of Nebraska, is represented by:

Donald B. Stenberg, Attorney General
State Capitol, Suite 2115
Lincoln, NE 68509
(402) 471-2682

Informational:

Lanet Asmussen
Clerk of the Nebraska Supreme Court
P.O. Box 98910
Lincoln, NE 68509
(402) 471-3731

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TABLE OF CITED AUTHORITIES

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Elledge v. Florida, ___ U.S. ___, 119 S.Ct. 366, 142 L.Ed2d 303 (1998)	10
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Cert. denied 504 U.S. 930, 112 S.Ct.
1995, 118 L.Ed2d 591 (1992) 1, 3
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rev'd 524 U.S. ___, 118 S.Ct. 1895,
141 L.Ed2d 76 (1998). 5
State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982);
Cert. denied 456 U.S. 984, 102 S.Ct.
2260, 72 L.Ed 864 . . . . . 1, 2
State v. Moore, 217 Neb. 609, 350 N.W.2d 14 (1984). . . 1, 3
State v. Moore, 243 Neb. 679, 502 N.W.2d 227 (1993) . . 1, 3, 4
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CITATIONS OF ALL REPORTED OPINIONS IN STATE V. MOORE

1. State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982)
Cert. denied 456 U.S. 984, 102 S.Ct. 2260,
72 L.Ed 864 (direct appeal)
2. State v. Moore, 217 Neb. 609, 350 N.W.2d 14 (1984)
(first state post conviction)
3. Moore v. Clarke, 904 F.2d 1226 (8th Cir. 1990)
(State's appeal from Moore's only federal
habeas corpus suit)
4. Moore v. Clarke, 951 F.2d 895 (8th Cir. 1991)
Cert. denied 504 U.S. 930, 112 S.Ct. 1995,
118 L.Ed2d 591 (1992). State failed to get
a review by Eighth Circuit and failed to
have this Court grant certiorari
5. State v. Moore, 243 Neb. 679, 502 N.W.2d 227 (1993).
Following federal mandate, Nebraska Supreme
Court orders a new sentence hearing, but
refuses to fashion guidelines for resentencing
panel on "exceptional depravity" aggravator.
6. State v. Moore, 250 Neb. 805, 553 N.W.2d 120 (1996)
Cert. denied 520 U.S. 1176, 117 S.Ct. 1448,
137 L.Ed2d 554 (1997). Moore's direct appeal
from his resentence to death.
7. State v. Moore, 256 Neb. 553, 591 N.W.2d 86 (1999)
Moore's appeal on his second post conviction
action and from which certiorari is now sought.

BASIS OF JURISDICTION

The judgment of the Nebraska Supreme Court from which Moore seeks review by writ of certiorari was filed April 2, 1999. (App. pp. 1-10). Moore filed a Motion for Rehearing April 12, 1999. The Nebraska Supreme Court denied that motion on April 21, 1999. (App. p. 11).

The statutory basis for the United States Supreme Court to review this matter on a writ of certiorari is found at 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION AT ISSUE

AMENDMENT VIII to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

1. Facts of Crimes.

In Omaha, Nebraska, on August 22, 1979, Moore shot Reuel Van Ness, Jr., dead. On August 27, 1979, Moore shot Maynard Helgland dead. Both victims were cab drivers Moore was robbing.

2. Procedural History: Moore loses.

In a trial to the court without a jury, Moore was convicted of two counts of felony murder. On June 20, 1980, he was sentenced to death for both crimes by a three-judge panel.

Moore failed to get any relief on direct appeal. State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982), cert. denied 456 U.S.

984, 102 S.Ct 2260, 72 L.Ed. 864. He failed to get relief on his first post conviction action State v. Moore, 217 Neb. 609, 350 N.W.2d 14 (1984).

3. Procedural History: State loses.

He filed his first and only federal habeas corpus action to date in 1984. He got relief. The Honorable Warren K. Urbom of the U.S. District Court of Nebraska, on September 20, 1988, granted Moore's petition for a writ of habeas corpus on the grounds that Nebraska's "exceptional depravity" aggravator as defined and qualified by Nebraska Supreme Court cases remained unconstitutionally vague and indefinite. (App. pp. 22-27).

The State chose to appeal this decision and lost before the Eighth Circuit. Moore v. Clarke, 904 F.2d 1228 (8th Cir. 1990). The State sought a rehearing and a suggestion of rehearing en banc and that was rejected. Moore v. Clarke, 951 F.2d 895 (8th Cir. 1991). The State failed in an effort to get certiorari, cert. denied at 504 U.S. 930, 112 S.Ct. 1995, 118 L.Ed2d 591 (1992).

4. Procedural History: Nebraska Supreme Court adds to delay.

Upon remand by the Eighth Circuit, Judge Urbom ordered on July 1, 1992, Moore's sentence reduced to life imprisonment unless the State filed capital resentencing proceedings within 60 days. State v. Moore, 502 N.W.2d at 228. The State moved the Nebraska Supreme Court for resentencing and that the Nebraska Supreme Court "define the 'exceptional depravity' element of the aggravating circumstances described in 29-2523(1)(d) to satisfy the federal court's objections as to constitutionality." (502 N.W.2d at 228).

On July 9, 1993, the Nebraska Supreme Court rejected out of hand the State's request it define "exceptional depravity" consistent with the constitution. In one terse sentence, with no analysis, it said, "However, this opinion will not reach the issue of the constitutionality of the aggravating circumstances described in 29-2523(1)(d)." (502 N.W.2d at 228).

The Nebraska Supreme Court also refused to do the resentencing examination itself, though believing it had the power to do so. ". . . Absent a U.S. Supreme Court decision as to the propriety of appellate court reweighing, it would be a waste of judicial resources for this Court to render an opinion which will subsequently be overturned on a writ of habeas corpus by the federal courts." (502 N.W.2d at 230).

A three-judge panel was then convened and sentenced Moore to death again on April 21, 1995. State v. Moore, 250 Neb. 805, 553 N.W.2d 120, at 125 (1996). Without guidance from the Supreme Court, the sentencing panel had fashioned its own formulation for describing "exceptional depravity" (553 N.W.2d at 131-133), and the panel formulated the definition it did use after the hearing, making this an ex post facto application (553 N.W.2d at 133-136). On September 27, 1996, the Nebraska Supreme Court affirmed the second imposition of the death penalty, State v. Moore, 250 Neb. 805, 553 N.W.2d 120 (1996); cert. denied 520 U.S. 1176, 117 S.Ct. 2448, 137 L.Ed2d 554 (1997).

5. Procedural History. Moore raises Lackey issue.

Moore petitioned for a writ of certiorari from the affirming

of his resentence to death. That was denied April 14, 1997 (App. p. 14). On April 30, 1997, he filed a motion for post conviction relief raising the issue of Reeves v. Hopkins, 102 F.3d 977 (8th Cir. 1996), rev'd 524 U.S.___, 118 S.Ct. 1895, 141 L.Ed2d 76 (1998), the "exceptional depravity issue," and the "Lackey" issue in the following language:

> That the sentence of death has been inflicted in a cruel and unusual manner in violation of the Eighth Amendment to the Constitution of the United States and in violation of Article I of the Nebraska Constitution. Defendant has been serving seventeen years of prison time in isolated, segregated confinement in the Nebraska State Penitentiary while being under explicit threats of death, including a series of execution date settings and vacating of execution dates resulting in unnecessarily cruel and unusual punishment. The intermittent vacating and setting of execution dates have been caused in part due to ineffective assistance of counsel as well as protracted delays in Court proceedings not caused by the Defendant. Conversely, any delays in the proceedings initiated by the Defendant were solely and only in an attempt to vindicate himself of the rights guaranteed him under the Constitutions of the United States and the State of Nebraska. (App. pp. 16, 17).

The district court granted no hearing and summarily disposed of all arguments. On Lackey, the Judge ruled: "The Court determines as a matter of law that however regrettable the length of time from the initial sentence to the present time be, there is no violation of any constitutional right." (App. p. 21). On appeal, the Nebraska Supreme Court agreed in strident language: "Soundly reject"; "mockery of justice"; "state has not . . . sought to convict Moore invalidly in order to prolong the time"; "wreak havoc"; "without merit"; "claim . . . if proved," not a violation of the Eighth Amendment. (App. p. 9).

ARGUMENT

1. Rule 10 Consideration Moore Relies Upon.

Moore believes the Nebraska Supreme Court incorrectly "has decided an important question of federal law that has not been, but should be, settled by this Court." Moore believes that executing him now is cruel and unusual punishment where most of his nineteen years on death row have been the result of futile State efforts to develop constitutional guidelines for Nebraska's "exceptional depravity" aggravator. This is exacerbated by a deliberate, considered, and wrong decision by the Nebraska Supreme Court in 1993 to not frame such guidelines after two federal courts (U.S. District for Nebraska, Eighth Circuit) told Nebraska they were needed.

Moore recognizes that no state or federal court has decided such "Lackey" claims favorable to a condemned prisoner. Moore is further aware that Justice Stevens, joined by Justice Breyer, in a March 27, 1995, Memorandum for Lackey's denied petition for a Writ of Certiorari, called for the state and federal courts to be a "laboratory in which the issue receives further study." Lackey v. Texas, 514 U.S. 1045, 115 S.Ct. 1421, 1422, 131 L.Ed2d 304). Every federal and state court discussion of the matter since the Stevens Memorandum dismisses the issue as "without merit." The Nebraska Supreme Court's use of "soundly reject", "mockery of justice", "wreak havoc", and casting the test as one where the State must plot an invalid conviction in order to extend the time on death row is tame by comparison to many courts handling of post Stevens

Memorandum "laboratory experiments."

The strongest argument for granting certiorari in this case is that the Lackey "laboratories" are staffed by "scientists" with minds closed to the substance of the Stevens memorandum. A real, open, and frank analysis of this "important undecided" issue (J. Breyer, concurrence, 115 S.Ct. at 1442) is not happening in the state and lower federal courts. Moore presents the perfect facts to make a real analysis because, unlike the cases of most other condemned men, the State's unsuccessful appeals and actions delayed the execution more than the prisoners' appeals and actions.

2. The Lackey Memorandum.

In his 3/27/95 Memorandum calling for a laboratory in the courts to test whether execution following "some seventeen years on death row" violates the Eighth Amendment, Justice Stevens established the issue's sturdy foundation. Quoting significant United States and foreign authority and commentary, Justice Stevens sets out the analysis:

> (1) Although the framers of the Constitution approved of capital punishment, long delays probably never or rarely happened in those days.
>
> (2) The remaining grounds for execution (retribution and deterrence) don't get well served after long delays because, in event no execution occurred, the prisoner would still serve life in prison.
>
> (3) English jurists with "cruel and unusual" constitutional provisions have determined long delays of execu-

tion to be cruel and unusual punishment.

Justice Stevens felt delays should be examined to assess the cause of the delays. Was the prisoner using repetitive, frivolous motions to get the delay? Was he exercising legitimate rights to review? Was any delay caused by negligent or deliberate action by the State? (115 S.Ct. at 1422).

The Lackey Memorandum issued an invitation:

> "Though the importance and novelty of the question presented by this certiorari petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts. (115 S.Ct. at 1421) . . . Often a denial of certiorari on a novel issue will permit the state and federal courts to serve as laboratories in which the issue receives further study before it is addressed by this Court." (115 S.Ct. at 1422).

3. The state and lower federal courts respond vehemently and negatively to the Memo.

The Stevens Memorandum must have hit exposed judicial nerves. Negative responses, often with intemperate language, were instant. With four years perspective, the negative response can be termed consistent, uniform, even homogeneous. The opinions are also predictable, churning through procedural bars (too late, abuse of writ, can only be raised in first federal habeas corpus), Armageddon predictions (stays will be denied as speed more important than accuracy), and concluding with a dismissal of the issue as "without merit." Absent, except in dissent, is any effort to address Stevens' points about framers' experience, deterrence, and retribution.

Four days after the Memo, the Eleventh Circuit responded in Porter v. Singletary, 49 F.3d 1483, at 1485, that to entertain the prisoner's recent reliance on the Lackey Memo would be an "abuse of process." By early May, 1995, six weeks after the Memo, the Ninth Circuit in McKensie v. Day, 57 F.3d 1461 (1995), criticized the prisoner for raising the Lackey issue 2 1/2 weeks ago. Why didn't he raise it 5 years ago (1990)? (57 F.3d at 1465).

The Fourth Circuit in Turner vs. Jobe, 58 F.3d 924 (4th Cir. 1995) did not mince words about six weeks after the Memo. The majority went with the point the prisoner should have raised it years ago (58 F.3d at 930) and mocked the issue with the reduction to absurdity that the issue is "ripe" only on the eve of execution and that the issue, raised late, is an "abuse of writ." (58 F.3d at 931). One judge felt that majority wasn't stern enough and in concurring called the Lackey concept "an affront to the law abiding citizens, . . . [his] claim should be recognized for the frivolous claim it is . . . for the manipulation it is . . . As long as the courts indulge such sophistic arguments, then such arguments will be made, and the politicization of capital punishment within the courts will continue." (58 F.3d at 932-933).

The Eighth Circuit in Chambers v. Bowersox, 157 F.3d 560 (8th Cir. 1998) adopted the "untimely raised" procedurally barred approach. Noting some foreign countries were refusing to extradite prisoners to the United States because of the cruelty of long delayed executions, it then lectured foreign courts that our careful reviews take time and foreign courts should extradite

criminals over their own prohibitions against the cruelty of long delayed executions. 157 F.3d at 570. The Fifth Circuit in White vs. Johnson, 79 F.3d 732 (5th Cir. 1998) finds these "Lackey claims meritless," 79 F.3d at 440.

One obvious path to lower federal court review has actually been cut off completely. Lackey claims are not within the exceptions to the AEDPA enumerated at 28 U.S.C. 2244(b)(2) that can be raised after a first federal habeas corpus. This hugely diminishes the specimen pool for the lower federal court laboratory. See Ortiz v. Stewart, 149 F.3d 923 (Cir 9, 1998); Gerlaugh v. Stewart, 167 F.3d 1222 (9 Cir. 1999).

The Moore opinion recites fifteen state supreme court and federal cases all rejecting the Lackey Memo arguments as "too late", "procedurally barred", and no merit anyway. There are dozens of other cases with that result. (Appendix pp. 8-9). None of them grapple with the substance of the Lackey Memo: the framers didn't envision long delays and after the long delay, does the retribution and deterrence value become insignificant; if so, let's examine the reasons for the delays and, on a case by case basis, see if execution would be cruel and unusual.

4. Why this Court should revisit Lackey in this case.

In 1996 and again in 1998, this Court, over objection of Justices Stevens and Breyer, denied certiorari in two Lackey cases. See Gomez v. Fierro, ___U.S.___, 117 S.Ct. 285, 136 L.Ed2d 204 (1996); and Elledge v. Florida, ____U.S.____, 119 S.Ct. 366, 142 L.Ed2d 303 (1998). The question naturally comes to mind: Why

grant certiorari in 1999?

The laboratory of lower court and state court work on the issue is an abject failure. That no court in over four years and scores of opinions has even nibbled at the substance of the Lackey Memo arguments means either the issue and its rationale are not getting fair, thoughtful analysis or the issue and arguments are so unconventional and insubstantial that the dismissing of the argument as "without merit" and without thoughtful analysis is so correct as to be beyond debate.

Moore's case presents a good test case to analyze the issue: (1) How to read the framers' "intent" about something rarely happening then. (2) After nineteen or twenty years, how are deterrence and retribution not well served by a life sentence certain as opposed to execution? (3) Who was responsible for the delay?

Moore offers this "delay" calculation: based on the State bungling the depravity issue, debit the State one and one-half years of his direct appeal where depravity was raised and improperly decided; add one half the four years on his writ of habeas corpus, or two more years; for 1988 to the 1995 resentencing, six and one-half years are all accountable to the State's unsuccessful appeal and the Nebraska Supreme Court's refusal to define "exceptional depravity" after the federal courts said it needed to. That would account for almost ten of the fifteen years to resentencing.

Apportioning delay after 1995 is not easy. Moore has been

conducting the appeals. On the other hand, the appeals refer back to the "depravity" issue that still will get federal habeas corpus review. That is not an insubstantial matter given the fact the sentencing panel, unguided by the Nebraska Supreme Court, came up with novel tests approved on appeal but not used before or after in Nebraska cases.

5. State and lower federal court ignore or incorrectly dismiss arguments that force looking at the Lackey issue on its merits.

The arguments by courts below and the Nebraska Supreme Court in this case that have allowed the issue to be summarily dismissed as "without merit" are weak and deserve analysis by this Court. Routinely the "prisoner is untimely", "abusing process at this late date", "can only raise it on first federal habeas corpus." Those arguments fail to recognize that every federal court that has ever decided the issue decided delays were not prohibited as cruel and unusual punishment. Before the Stevens Memo, raising such issues would be considered frivolous. From the tone of most opinions of lower federal courts, it is still treated that way. In any event, the 3/27/95 Stevens Memo should have given the competent lawyer representing the condemned the cover to raise Lackey without having to face judicial charges of "frivolous pleading" to the disadvantage of his client. To have honored stare decisis prior to 3/27/95 should not cost a prisoner his life.

The Nebraska Supreme Court, reciting but not citing McKensie v. Day verbatim, threatens that stays will no longer be generously granted, the courts preferring speed over accuracy. (App. p. 9).

This overlooks two things: (1) Judges aren't really that peevish; and (2) The abuse of process or insubstantial argument of the prisoner seeking the stay can be taken into account in later assessing the delay in relation to the Eighth Amendment argument.

CONCLUSION

The "laboratory" of state and lower federal courts has not and will not do the job of analyzing (1) framers' lack of experience with long delays; (2) impact of long delays on deterrence and retribution; and (3) reasons for delays in particular cases. This Petition must be granted unless the Lackey Memo does not present "an important undecided" federal question as Justices Stevens and Breyer believed. Are the Lackey Memo arguments mere "sophistry" (Turner v. Jobe, supra, 58 F.3d at 933)? Are they beyond the pale of any logical and rational coverage of the prohibition against cruel and unusual punishment? Is the repeated and consistent summary dismissing of the arguments as "without merit" correct beyond debate? The answers are no, no, and no. This Court must go where the state and lower federal courts refuse to go.

CAREY DEAN MOORE, Defendant,

by Edward F. Fogarty 9/15/99 (member US Sup Ct Bar)

Edward F. Fogarty NE #11337
FOGARTY, LUND & GROSS
700 Service Life Building
1904 Farnam Street
Omaha, Nebraska 68102
(402) 341-3333
and
Larry W. Myers NE #
10808 Prairie Hills Drive
Omaha, Nebraska 68144
(402) 391-2200
Attorneys for Petitioner.

APPENDIX

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OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska, Appellee,
v.
Carey Dean Moore, Appellant.

Case Caption

State v. Moore

Filed April 2, 1999. No. S-97-511.

Appeal from the District Court for Douglas County: James A. Buckley, Judge. Affirmed.

Edward F. Fogarty, of Fogarty, Lund & Gross, and Larry W. Myers for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

STATE V. MOORE

Filed April 2, 1999. No. S-97-511.

1. **Postconviction: Constitutional Law: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.

2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.

3. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution.

4. **Postconviction.** An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the movant is entitled to no relief.

5. **Postconviction: Appeal and Error.** A motion for postconviction relief may not be used to obtain further review of issues already litigated.

6. **Constitutional Law: Criminal Law: Homicide: Lesser-Included Offenses: Jury Instructions.** The U.S. Constitution does not require that the jury in a felony murder case be instructed as to lesser-included offenses where the crime, as defined by state law, does not include any lesser offenses.

7. **Postconviction: Effectiveness of Counsel: Pleas: Proof.** When a defendant in a postconviction motion alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his or her case as a result of his or her attorney's actions or inactions.

8. **Trial: Appeal and Error.** An issue not presented to or decided by the trial court is not an appropriate issue for consideration on appeal.

9. **Constitutional Law: Death Penalty.** Prolonged incarceration on death row, in and of itself, does not violate the Eighth Amendment to the U.S. Constitution.

10. **Constitutional Law: Criminal Law.** With reference to cruel and unusual punishment, the Nebraska Constitution does not require more than does the Eighth Amendment to the U.S. Constitution.

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HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

I. NATURE OF CASE

Carey Dean Moore filed a motion for postconviction relief in the district court for Douglas County. The district court denied relief, without an evidentiary hearing, and Moore appealed. For the reasons stated herein, we affirm the judgment of the district court.

II. FACTUAL BACKGROUND

In a 4-day span during August 1979, Moore robbed and murdered two Omaha taxi drivers. Moore was convicted of two counts of first degree murder, based on a felony murder theory, and was sentenced to death by a three-judge panel in 1980. We affirmed the convictions and sentence in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864 (*Moore I*). The facts of the underlying crimes are more fully set out in that opinion.

Moore filed his first state postconviction action in 1982, alleging, inter alia, that his trial counsel was ineffective and that Nebraska's death penalty procedures were unconstitutional. On appeal, we rejected these arguments. *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984) (*Moore II*).

Moore then filed a federal habeas corpus action and was granted a writ of habeas corpus based upon his constitutional challenge to Nebraska's death penalty procedures. The U.S. Court of Appeals for the Eighth Circuit affirmed the order of resentencing, and this order was reaffirmed by the Eighth Circuit on denial of rehearing. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *rehearing denied* 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992).

On remand, this court determined that it would decline to itself resentence Moore, but would instead remand the cause to the state district court for resentencing. *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993) (*Moore III*). Moore was again sentenced to death, and on direct appeal from his resentencing, he again alleged, inter alia, that Nebraska's death penalty statutes and procedures were unconstitutional. We rejected those arguments. *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *cert. denied* 520 U.S. 1176, 117 S. Ct. 1448, 137 L. Ed. 2d 554 (1997) (*Moore IV*).

On March 3, 1997, this court set an execution date of May 9 for Moore. Moore filed the present state action for postconviction relief on April 30. On May 5, this court stayed Moore's execution in light of *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996), *rev'd* ___ U.S. ___, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998). On the same date, the district court denied Moore's motion for postconviction relief, without an evidentiary hearing. This appeal followed, and because this is a capital case, the appeal was placed on our docket. See Neb. Rev. Stat. § 24-1106 (Reissue 1995).

III. ASSIGNMENTS OF ERROR

Moore alleges, restated, that the district court erred in (1) not concluding that Moore was denied due process of law as guaranteed to him by the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution because in determining innocence and

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guilt, the original trial court gave no consideration to lesser-included offenses to murder in the first degree and was not permitted to give consideration to lesser offenses by existing Nebraska case law; (2) not concluding that Moore was denied his right to effective assistance of counsel under the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution when at the original trial, his attorney allowed the waiver of a jury and thus lost the opportunity for instruction on lesser-included offenses to murder in the first degree and the right to preserve such error on appeal; (3) not concluding that Moore was denied his right to effective assistance of counsel, violating the federal and state Constitutions, when at his original trial, no defense was raised that Moore could be found guilty of a lesser offense than murder in the first degree and no particular effort was made to present evidence supporting such a theory; (4) not concluding that Moore was denied due process of law under the federal and state Constitutions because the 1995 resentencing panel failed to give Moore advance notice of which definition of the "exceptional depravity" aggravator the panel would use; (5) not concluding that Moore was denied his right to effective assistance of counsel, violating the federal and state Constitutions, at his 1995 resentencing because if a constitutionally adequate definition of "exceptional depravity" was ascertainable from the case law, his counsel failed to ascertain it; (6) applying the "exceptional depravity" aggravator which, as recited in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1995) and elaborated upon in case law and as fashioned by the sentencing court, remains vague and indefinite, in violation of the due process and freedom from cruel and unusual punishment protections provided to Moore by the 5th, 8th, and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 9, of the Nebraska Constitution; and (7) not finding that Moore has been subjected to cruel and unusual punishment, in violation of his rights under the Eighth Amendment to the U.S. Constitution and under article I, § 9, of the Nebraska Constitution, by virtue of his long confinement in isolation on death row, the repeated death warrants issued and then stayed, and the delays essentially not caused by him, but, rather, by the State.

IV. STANDARD OF REVIEW

A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998). A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *Id.*

An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). However, an evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the movant is entitled to no relief. See *id.*

V. ANALYSIS

1. Ineffective Assistance of Trial Counsel

Moore's first three assignments of error all relate to the alleged ineffective assistance of counsel at his original trial. This argument, however, has already been addressed by this court. In his first postconviction action, *Moore II*, Moore based his postconviction motion in part on the assertion that his trial counsel was "inadequate and incompetent." *Id.* at 609, 350 N.W.2d at 15. This court stated that "we have examined the record and find no evidence to support the charge of inadequate counsel." *Id.* at 610, 350 N.W.2d at 16.

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We have repeatedly stated that a motion for postconviction relief may not be used to obtain further review of issues already litigated. *State v. Burnett*, 254 Neb. 771, 579 N.W.2d 513 (1998); *State v. Lytle*, 224 Neb. 486, 398 N.W.2d 705 (1987); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987). See, also, *State v. Jones*, 254 Neb. 212, 575 N.W.2d 156 (1998), *disapproved on other grounds, State v. Silvers, supra*; *State v. Fletcher*, 253 Neb. 1029, 573 N.W.2d 752 (1998).

Moore's first three assignments of error were not only available to be raised in his first postconviction action, but they were raised and rejected in that action. If there is any basis for a claim of ineffective assistance of counsel that was not available to Moore at the time of his first postconviction motion, he does not identify it in the present case. Consequently, his claims relating to ineffective assistance of his trial counsel are procedurally barred, and we do not consider them here.

We additionally note that even if these arguments were not procedurally barred, all three assignments of error are premised on the alleged constitutional infirmity of the trial court's failure to give instruction on lesser-included offenses to felony murder. Since Moore's brief was filed, the U.S. Supreme Court has clarified that the U.S. Constitution does not require that the jury in a felony murder case be instructed as to lesser-included offenses where the crime, as defined by state law, does not include any lesser offenses. See *Hopkins v. Reeves*, ___ U.S. ___, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998), *rehearing denied* ___ U.S. ___, 119 S. Ct. 5, 141 L. Ed. 2d 766. That being the case, even were Moore's arguments not procedurally barred, they would be without merit.

2. Exceptional Depravity Aggravator

(a) Ex Post Facto Claim

Moore's fourth, fifth, and sixth assignments of error relate to the use of the aggravating circumstance of "exceptional depravity" to support his death sentence. See § 29-2523(1)(d). Again, we have previously addressed these arguments.

> Moore alleged on direct appeal from his resentencing that the sentencing panel "committed reversible error by applying an unconstitutionally vague statutory aggravating circumstance . . . and by fashioning their [sic] own new definition of the aggravating circumstance in an ex post facto manner thereby depriving [Moore] of notice of the elements of the aggravating circumstance and further depriving him of the opportunity to respond and present evidence to rebut the facts necessary to establish the presence of the newly defined aggravating circumstance."

Moore IV, 250 Neb. at 815, 553 N.W.2d at 129-30. Moore's argument, essentially, was that the resentencing panel had redefined § 29-2523(1)(d) in a way that Moore was not prepared to rebut. While we noted that the resentencing panel had formulated new standards for § 29-2523(1)(d), we found that those standards were based on existing case law, and we determined that "because Moore received sufficient notice and an opportunity to present evidence at the resentencing hearing, there was no violation of due process." *Moore IV*, 250 Neb. at 826, 553 N.W.2d at 136.

> In fact, we stated:
> Moore received even greater notice than constitutionally required. He knew from the Eighth Circuit's opinion in *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992), that the scope of the exceptional depravity component of aggravating circumstance § 29-2523(1)(d) would be an issue in the resentencing proceedings. Thus, he could hardly have been surprised when the

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resentencing panel *further narrowed* the definitions of exceptional depravity precisely along the lines suggested by the federal courts.

(Emphasis supplied.) *Moore IV*, 250 Neb. at 826, 553 N.W.2d at 135.

Moore's fourth assignment of error in the present action does nothing more than reiterate the ex post facto argument presented to and rejected by this court in *Moore IV*. In accord with the principles set forth above, Moore's fourth assignment of error is procedurally barred, and we do not consider it.

(b) Ineffective Assistance of Counsel

Moore's fifth assignment of error, however, is not procedurally barred. The record reveals that the same attorney represented Moore at his 1995 resentencing hearing and on appeal from that resentencing. Moore alleges that this attorney provided ineffective assistance of counsel. This claim was not available to Moore on direct appeal, and this is Moore's first postconviction motion since his direct appeal from resentencing. Therefore, this is Moore's first opportunity to present the claim, and it is not procedurally barred.

When a defendant in a postconviction motion alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his or her case as a result of his or her attorney's actions or inactions. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998).

In the present case, we need not determine if Moore's attorney at resentencing was ineffective, because we find that Moore has not sufficiently shown how he was prejudiced by this alleged ineffectiveness.

Moore's argument is premised on our determination in *Moore IV*, 250 Neb. at 826, 553 N.W.2d at 135:

> [T]he resentencing panel's reformulation of the aggravating circumstance was accomplished by isolating the previous applications of the exceptional depravity prong of aggravating circumstance § 29-2523(1)(d). This is by definition a narrowing of the information which Moore had regarding this aggravating circumstance prior to the resentencing hearing. As such, it was neither unforeseeable nor did it expand the reach of that aggravating circumstance beyond information that Moore was on notice to prepare for concerning such aggravating circumstance.

Moore's claim is that since his attorney claimed on appeal that the definition of "exceptional depravity" was not ascertainable in advance, his attorney must have failed to foresee that which this court said was foreseeable and, therefore, that his attorney failed to effectively counsel him. Without commenting on the veracity of this claim, we find that even if we assume it to be true, Moore has identified no facts supporting a finding that Moore was prejudiced thereby.

Moore's claim in his motion for postconviction relief is simply that "if the definition of the aggravator was reasonably foreseeable as extrapolated from previous Nebraska Court decisions giving definition to the aggravator, counsel should have known of this possibility and by failing to do so provided ineffective assistance of counsel." In neither his petition nor his appellate brief does Moore claim how this alleged ineffectiveness in any way prejudiced him at resentencing.

Moore does not claim, for example, that his counsel failed to present, or was prevented from presenting, evidence rebutting salient aspects of the narrowed definition of "exceptional depravity" relied upon by the sentencing panel. Since *Moore I*, every sentencing panel and reviewing court has cited Moore's cold, calculated planning of the victims' deaths and, in particular, selection of the victims based on particular characteristics as *the* integral part of the exceptional depravity prong. The *Moore I* court quoted from the findings made by the sentencing panel, which findings were fully supported by uncontroverted evidence:

> "The defendant's own statements, in his confession to Officers O'Donnell and Thompson while in custody at Charles City, Iowa, indicate that these crimes had been in the planning stage for at least a day or two before the Van Ness homicide. Apparently on the evening prior to the Van Ness murder, the defendant had called a number of cabs from a telephone booth somewhere on Farnam Street in the downtown Omaha area to see how quickly each would respond to his call. The defendant then hid somewhere in the vicinity to await each cab's arrival, at which time he checked the cab to determine whether the driver would be a suitable victim, i.e., not too young, since the defendant stated that it was easier for him to shoot an older man rather than a younger man nearer his own age. On the evening of the Van Ness homicide, the defendant's plan was to call one cab at a time from the Smoke Pit restaurant, and, if the driver who responded 'wasn't too old,' the defendant would just not identify himself as the fare for which the cab had been summoned. When Mr. Van Ness arrived at the Smoke Pit on August 22, 1979, the defendant determined that this was the driver who would be robbed and shot because 'he wasn't too young'.
>
> "A similar pattern of events unfolded on August 26, 1979. The defendant went to the Greyhound Bus depot at 18th and Farnam Streets in Omaha that evening, and, when he saw a lone cab with an older driver parked at the taxi stand outside the depot, he got into the cab and directed the driver to take him to the Benson area. According to the defendant, this particular cab and driver were selected both because there were no other cabs at the taxi stand at the time, thus decreasing the chances of the defendant's being identified, and because the driver was an older man. The defendant then stated that, as previously discussed, he had planned ahead of time to rob and shoot the driver of whichever cab he selected." In his confessions the defendant stated that he killed each of the victims in order that the victim would not be able to identify him as the robber.

Id. at 461-62, 316 N.W.2d at 36-37.

Moore has not set forth in his motion for postconviction relief or in his brief what evidence he would present to rebut his own confession or the narrowed definition of exceptional depravity utilized by the sentencing panel. Moore has had ample notice and opportunity to explain the circumstances or present mitigating evidence with reference to the cold, calculated planning of the victims' deaths, and he has failed to do so. Additionally, our review of the records and files presented provides us with no basis to show that Moore was prejudiced by any alleged ineffectiveness of counsel or that he is entitled to postconviction relief on this claim. We determine that Moore's fifth assignment of error is without merit.

(c) Application of Exceptional Depravity

Moore's sixth assignment of error is that the district court "erred by applying the 'exceptional depravity' aggravator," because, as defined, it continues to violate the 5th, 4th, and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 9, of the Nebraska Constitution. Brief for appellant at 7-8.

This assignment of error is without merit. First, in the present postconviction action, the district court did not "apply" the exceptional depravity aggravator. In fact, the underlying validity of § 29-2523(1)(d) is not even raised as an issue in Moore's motion for postconviction relief. To the

extent that the assignment of error might erroneously refer to the "district court" where Moore intended to refer to the application of "exceptional depravity" by the 1995 resentencing panel, this issue was again not presented to the trial court in the present case. An issue not presented to or decided by the trial court is not an appropriate issue for consideration on appeal. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *cert. denied* ___ U.S. ___, 119 S. Ct. 219, 142 L. Ed. 2d 180.

Even had Moore properly presented the underlying validity of § 29-2523(1)(d) to the trial court in this case, we note that the argument would be procedurally barred. The alleged infirmities of § 29-2523(1)(d), as applied, could have been, and were, raised as error on direct appeal from the resentencing. The precise argument raised here was rejected by this court in *Moore IV*. Even if properly presented to a postconviction court, Moore's arguments regarding § 29-2523(1)(d) are procedurally barred, as they were resolved against him on direct appeal. *Moore IV*. Thus, Moore's sixth assignment of error is without merit.

3. *LACKEY* CLAIM

Moore claims that he has been subjected to cruel and unusual punishment by virtue of his now nearly 20-year confinement on Nebraska's death row. Essentially, Moore claims that it is cruel and unusual punishment to keep a person confined with the knowledge that he is to be executed and then to prolong that process pursuant to legal machinations. Moore's argument is completely without merit.

Arguments similar to Moore's have been raised in this country for nearly 40 years. See, *Chessman v. Dickson*, 275 F.2d 604 (9th Cir. 1960); *Andrews v. Shulsen*, 600 F. Supp. 408 (D. Utah 1984), *aff'd* 802 F.2d 1256 (10th Cir. 1986), *cert. denied* 485 U.S. 919, 108 S. Ct. 1091, 99 L. Ed. 2d 253 (1988), *rehearing denied* 485 U.S. 1015, 108 S. Ct. 1491, 99 L. Ed. 2d 718. The issue has most recently been revived in a memorandum opinion respecting a denial of certiorari by Justice Stevens, joined by Justice Breyer. *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995). See, also, *Elledge v. Florida*, ___ U.S. ___, 119 S. Ct. 366, 142 L. Ed. 2d 303 (1998) (Breyer, J., dissenting from denial of certiorari); *Gomez v. Fierro*, ___ U.S. ___, 117 S. Ct. 285, 136 L. Ed. 2d 204 (1996) (Stevens, J., joined by Breyer, J., dissenting from denial of certiorari). In his memorandum opinion in *Lackey v. Texas, supra*, Justice Stevens noted his interest in the question whether prolonged confinement on death row could constitute cruel and unusual punishment and stated that one of the justifications for denying a writ of certiorari was so that the issue, having been called to the attention of appellants, could be considered by the lower courts prior to being addressed by the U.S. Supreme Court.

Other jurisdictions have considered the Eighth Amendment claim that long confinement on death row constitutes cruel and unusual punishment and have soundly rejected such claims. See, *Chambers v. Bowersox*, 157 F.3d 560 (8th Cir. 1998); *White v. Johnson*, 79 F.3d 432 (5th Cir. 1996), *rehearing and suggestion for rehearing en banc denied* 85 F.3d 627 (5th Cir.), *cert. denied* ___ U.S. ___, 117 S. Ct. 275, 136 L. Ed. 2d 198; *Stafford v. Ward*, 59 F.3d 1025 (10th Cir. 1995), *cert. denied* 515 U.S. 1173, 115 S. Ct. 2640, 132 L. Ed. 2d 896; *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995), *cert. denied* 514 U.S. 1136, 115 S. Ct. 2019, 131 L. Ed. 2d 1017; *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995), *adopted on rehearing en banc* 57 F.3d 1493 (9th Cir.), *cert. denied* 514 U.S. 1104, 115 S. Ct. 1840, 131 L. Ed. 2d 846; *Williams v. Chrans*, 50 F.3d 1363 (7th Cir. 1995); *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995), *rehearing and suggestion for rehearing en banc denied* 58 F.3d 642 (11th Cir.); *Knight v. State*, 721 So. 2d 287 (Fla. 1998); *People v. Frye*, 18 Cal. 4th 894, 959 P.2d 183, 77 Cal. Rptr. 2d 25 (1998), *cert. denied* No. 98-7620, 1999 WL 150823 (U.S. Cal. Mar. 22, 1999); *State v. Schackart*, 190 Ariz. 238, 947 P.2d 315 (1997), *cert. denied* ___ U.S. ___, 119 S. Ct. 149, 142 L. Ed. 2d 122 (1998); *Ex Parte Bush*, 695 So. 2d 138 (Ala. 1997),

cert. denied ___ U.S. ___, 118 S. Ct. 418, 139 L. Ed. 2d 320; *State v. Smith*, 280 Mont. 158, 931 P.2d 1272 (1996), *cert. denied* ___ U.S. ___, 118 S. Ct. 410, 139 L. Ed. 2d 314 (1997); *Bell v. State*, 938 S.W.2d 35 (Tex. Crim. 1996), *cert. denied* ___ U.S. ___, 118 S. Ct. 90, 139 L. Ed. 2d 46 (1997); *Stafford v. State*, 899 P.2d 657 (Okla. Crim. 1995), *cert. denied* 515 U.S. 1173, 115 S. Ct. 2640, 132 L. Ed. 2d 896.

In addition, a similar claim was presented to this court in *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997), *cert. denied* ___ U.S. ___, 118 S. Ct. 555, 139 L. Ed. 2d 397. In that case, we noted that we had previously remanded the cause to the district court for additional factual findings and that in so doing, we had implicitly rejected the other errors assigned in the previous appeal. *Id.* The errors implicitly rejected included the appellant's *Lackey* claim. In that opinion, however, we did not discuss the reasoning behind our rejection of the argument. We find it appropriate to do so here.

Moore has not claimed that the State has set up a scheme to prolong the period of his incarceration or purposefully resentenced Moore in order to torment him. The delay in carrying out the sentence of death has been caused by the fact that Moore has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances. That this differs from the practice at common law, where executions could be carried out on the dawn following the pronouncement of the sentence, is a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences. See *McKenzie v. Day, supra*. Indeed, most of these procedural safeguards have been imposed by the U.S. Supreme Court in recognition of the fact that the common-law practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty. *Id.*, citing *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). We, therefore, hold that prolonged incarceration on death row, in and of itself, does not violate the Eighth Amendment to the U.S. Constitution. It would be a mockery of justice to conclude that delays caused by satisfying the Eighth Amendment themselves violate it.

Moore argues that the delay in this case was not caused by Moore's appeals, but by the State's legal maneuvers. However, as noted by the U.S. Court of Appeals for the Eighth Circuit in a similar case, "there is no evidence, not even a claim, that the State has deliberately sought to convict [the defendant] invalidly in order to prolong the time before it could secure a valid conviction and execute him." *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998). The record supports the fact that the State has not caused any intentional delay or sought to convict Moore invalidly in order to prolong the time before the sentence is carried out.

We are also mindful that sustaining Moore's claim would dramatically alter the calculus in granting stays of execution in death penalty cases. By and large, we have erred on the side of caution in granting stays of execution when death row inmates present claims that have not been given consideration by this court. The philosophy of erring on the side of caution would lose much of its vitality in a regime where the state risks being pushed permanently out of bounds if the execution is too long deferred by the process of adjudication. See *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995), *adopted on rehearing en banc* 57 F.3d 1493 (9th Cir.), *cert. denied* 514 U.S. 1104, 115 S. Ct. 1840, 131 L. Ed. 2d 846. Sustaining a claim such as Moore's, under these circumstances, would wreak havoc with the just administration of the death penalty by placing a substantial premium on speed rather than accuracy.

Based on these considerations, we conclude that Moore has not stated a claim which, if proved, constitutes a denial or violation of his rights under the Eighth Amendment, and as we have previously indicated, with reference to cruel and unusual punishment, the Nebraska Constitution

does not require more than does the U.S. Constitution. See, *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985); *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985). Moore's final assignment of error is without merit.

VI. CONCLUSION

For the foregoing reasons, we determine that all of Moore's assignments of error are either procedurally barred or without merit. Consequently, the judgment of the district court denying Moore postconviction relief is affirmed.

AFFIRMED.

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NEBRASKA SUPREME COURT
AND BRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
(402) 471-3731

April 21, 1999

Edward F. Fogarty
FOGARTY LUND LAW FIRM
1904 Farnam Street, #700
Omaha, NE 68102

IN CASE OF: S-97-0511, State v. Carey Dean Moore

Appellant/Motion for Rehearing & Brf **filed** 04/12/99

has been reviewed by the court and the following order entered:

Motion of appellant for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

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STATE OF NEBRASKA,

Plaintiff,

vs.

CAREY DEAN MOORE,

Defendant.

Doc. 106 No. 55

MOTION FOR POST CONVICTION RELIEF

COMES NOW the Defendant and pursuant to Sections 29-3001 through 29-3004, Neb. Rev. Stat. (Reissue 1995), moves the Court to vacate and set aside his convictions and sentences in the above captioned cases for the following reasons and each of them:

1. That the Defendant was charged with two counts of Murder in the First Degree and two counts of Use of a Firearm in the commission of a felony. Prior to trial, the Defendant, following advice of counsel, waived his right to trial by jury and proceeded to trial by the Court in front of the Honorable John E. Clark on the above referenced charges;

2. That at the conclusion of his non-jury trial, the Court found the Defendant guilty of all charges.

3. That a three-judge sentencing panel was convened and an evidentiary hearing was held after which, on June 20, 1980, the Defendant was sentenced to death on each count of murder. In both cases the sentencing panel found that the second prong of Section 29-2523(1)(d); "the murder ... manifested exceptional depravity by ordinary standards of morality and intelligence," was proved beyond

APR 30 1997

MARY L. ESAF
CLERK DISTRICT COURT

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a reasonable doubt and the presence of this aggravating circumstance provided the weight of aggravating circumstances to be deemed as sufficient to impose the death penalty.

4. That on September 20, 1988, the United States Supreme Court granted the Defendant's Petition for a Writ of Habeas Corpus and ordered that the Defendant have a new sentencing hearing or be resentenced to life imprisonment. The decision of the United States Supreme Court was affirmed by the Eight Circuit Court of Appeals on May 25, 1990, in Moore v. Clarke, 904 F.2d 1228 (8th Cir. 1990) rehearing denied 951 F.2d 895 (8th Cir. 1991). The gravaman of the Court's order consisted of the determination that the second prong of aggravating circumstance, Section 29-2523(1)(d) was unconstitutionally vague and overbroad on its face and that the Nebraska Courts had not sufficiently narrowed the application of the Aggravator so as to cure the violation of the Eighth Amendment prohibition against cruel and unusual punishment, and the Fifth and Fourteenth Amendments guarantees of due process of law before the deprivation of one's life;

5. That a second sentencing panel was assembled for purposes of holding an evidentiary hearing and determining the appropriate sentence in this case;

6. That at the conclusion of the sentencing hearing the Court took the issues under advisement and on April 25, 1995, imposed sentences of death on each count once again finding the presence of

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the second prong of a ravating circumstance (1)(2, o be present in both cases;

7. That on direct appeal of the second sentencing hearing the Nebraska Supreme Court affirmed the sentences of death State v. Moore, 250 Neb. 805 (1996) and on April 14, 1997, the United States Supreme Court denied Certiorari in this case;

8. That prior to the 1980 trial in this case, counsel for the Defendant advised against a trial by jury and that the Defendant waive his right by jury and have the Court sit as the trier of fact;

9. That the reason given by counsel to waive jury trial was that a jury would not receive any instruction on lesser-included offenses and would only be given the option to convict of murder in the first degree or acquit the Defendant and that in the opinion of counsel the jury would not acquit under these circumstances. Further, that even though counsel felt that there was no chance that the Court sitting alone would acquit the Defendant, it somehow would benefit him at sentencing if he waived a jury;

10. That in reliance upon counsel's advice the Defendant waived his right to trial by jury and unknowingly waive his right to present and preserve for appeal the right to challenge the impropriety of precluding a jury in a capital case from finding a defendant guilty of a lesser degree of homicide in a case charged as a capital offense. Having been unaware of these options the waiver of the Defendant was not voluntary and is in violation of his Sixth Amendment right to effective assistance of counsel, his

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Sixth Amendment right to trial by an impartial jury, his Sixth Amendment right to confrontation, and his Sixth Amendment right to call witnesses on his own behalf;

11. That at the trial in this case, which was conducted without a jury, counsel for the Defendant never offered as a defense to the charges that the Defendant should be found guilty of a lesser offense than the charges of murder in the first degree and was therefore deprived of effective assistance of counsel. Further, had he proceeded to trial by jury, the Court would have been compelled to instruct the jury on a lesser offense and there exists a substantial likelihood that the Defendant would not have been convicted of First Degree Murder in either or both cases;

12. That the trier of fact never considered the possibility of finding the Defendant guilty of an offense less than Murder in the First Degree and, therefore, the Defendant was denied due process of law;

13. That on resentencing, counsel for the Defendant was not informed by the Sentencing Panel of which definition of aggravating circumstance (1)(d), "exceptional depravity," would be used by that panel to determine the presence or absence of that prong of the aggravator, until after the evidentiary hearing and at the time of the pronouncemnt of sentence;

14. That as a result of the lack of any definition of the aggravator, counsel was unable to present evidence to prove the absence of the aggravator or argue against the presence of the aggravator because the definition of the aggravator was unknown to anyone until its being revealed at the pronouncement of sentence.

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Further, absent knowlec of the definition of the a ivator, counsel could not assess the relative weight that would be assessed to the aggravating circumstance even if it were found to be present. Since the weight of an aggravator in the "death equation" is determined not by simply a numerical count of aggravating circumstances, but on the relative weight attributed to it by the facts of the case, the Defendant was deprived of the opportunity to effectively rebut the presence or relative weight of the aggravating circumstance and consequently was deprived of due process of law;

15. That, alternatively, if the definition of the aggravator was reasonably foreseeable as extrapolated from previous Nebraska Court decisions giving definition to the aggravator, counsel should have known of this possibility and by failing to do so provided ineffective assistance of counsel.

16. That the sentence of death has been inflicted in a cruel and unusual manner in violation of the Eighth Amendment to the Constitution of the United States and in violation of Article I of the Nebraska Constitution. Defendant has been serving seventeen years of prison time in isolated, segregated confinement in the Nebraska State Penitentiary while being under explicit threats of death, including a series of execution date settings and vacating of execution dates resulting in unnecessarily cruel and unusual punishment. The intermitent vacating and setting of execution dates have been caused in part due to ineffective assistance of counsel as well as protracted delays in Court proceedings not caused by the Defendant. Conversely, any delays in the proceedings

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inflicted by Defendant were solely and only in an attempt to vindicate himself of the rights guaranteed to him under the Constitutions of the United States and the State of Nebraska.

WHEREFORE, the Defendant moves the Court to vacate and set aside the convictions and sentences in the above-captioned case, and each of them, for the above-stated reasons

FURTHER, Defendant prays for an evidentiary hearing to present testimony and evidence in support of the allegations contained herein;

FURTHER, Defendant prays for appointment of counsel to represent him in this matter because he is unable to pay for retained counsel.

Carey Dean Moore
Carey Dean Moore, Defendant

SUBSCRIBED AND SWORN TO BEFORE ME on this 29th day of April, 1997.

GENERAL NOTARY-State of Nebraska
FRANCISCO R. DELGADO
My Comm. Exp. Dec. 12, 2000

Francisco R. Delgado
Notary Public

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THE STATE OF N ASKA,) Dock 106 Page 055
)
Plaintif)
)
vs.) ORDER
)
CAREY DEAN MOORE,)
)
Defendant.)

On April 30, 1997, the defendant filed a motion for post conviction relief pursuant to Sections 29-3001, et seq., Nebraska Revised Statutes (Reissue 1995), moving the Court to vacate and set aside his convictions and sentences.

The defendant was convicted of two counts of murder in the first degree and two counts of use of a firearm in the commission of a felony and was sentenced to death on each count of murder. The final judgment of conviction and sentence were affirmed on direct appeal. State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982).

Thereafter, defendant filed a motion for post conviction relief in 1984 which motion was denied by the trial court and affirmed on appeal. State v. Moore, 217 Neb. 609, 350 N.W.2nd 14 (1984).

Thereafter and pursuant to a decision by the Federal Eighth Circuit Court of Appeals, the original sentences to death were vacated and in 1995 the defendant was again sentenced to death on both counts of murder. On direct appeal of the second sentences, the sentences were affirmed by the Supreme Court. State v. Moore, 250 Neb 805 (1996).

After reviewing defendant's motion and the files and records of the case, the Court is satisfied that the defendant is entitled to no relief, and that, therefore, his motion for post conviction relief should be denied.

Defendant waived jury trial and was convicted by the Court without a jury. Defendant contends that he relied on counsel's advice to waive his right to trial by jury and by doing so knowingly waived his right to present and preserve for appeal the right to challenge the impropriety of precluding a jury in a capital case from finding a defendant guilty of lesser included offenses.

In the defendant's first post conviction motion, the same issues of waiver of jury trial and ineffective assistance of counsel were raised, albeit in a different mode. Defendant is entitled to bring a second proceeding for post conviction relief only if the grounds relied upon did not exist at the time the first motion was filed. State v. Otey, 236 Neb. 915, 464 N.W.2d 352 (1991).

The mere fact that the issues are rephrased does not change that rule. State v. Luna, 230 Neb. 966, 434 N.W.2d 526 (1989).

In addition, the defendant having been charged and convicted of felony murder versus premeditated murder, there was no controlling legal authority then, nor is there now, that requires consideration of any lesser included offenses.

Defendant next contends that on resentencing, his counsel was not informed by the sentencing panel in advance

of sentencing which definition of aggravating circumstance (1)(d) "exceptional depravity" would be used by the panel to determine the presence or absence of that prong of the aggravator.

The statutory right to post conviction relief applies only where the defendant has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable. State v. Ferrell, 230 Neb. 958, 434 N.W.2d 331 (1989).

The Court determines as a matter of law that the defendant has no constitutional right to be apprised in advance of what definition of any aggravating circumstance the sentencing panel would utilize. Notwithstanding that, this issue could have been raised on direct appeal. A motion for post conviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. State v. Otey, supra.

Defendant also contends, in the alternative, that if the definition of the aggravator used by the sentencing panel was reasonably foreseeable and his counsel was ineffective in not knowing of this possibility and thereby failing to effectively rebut the presence or relative weight of that aggravator.

Counsel cannot be deemed ineffective in not protecting a defendant with a matter that is not a constitutional right. Notwithstanding, there is no way that as a matter of law defendant's counsel could have foreseen the ultimate

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definition of "exceptional depravity" that the sentencing panel utilized and, therefore, cannot be considered as having rendered ineffective assistance.

Finally, defendant contends that his sentence of death has been inflicted in a cruel and unusual manner in violation of the Eighth Amendment to the United States Constitution inasmuch as he has been serving 17 years in custody from the time of his initial sentences. He claims that a part of this time is due to ineffective assistance of counsel but does not set forth any specific facts other than those previously addressed. The Court determines as a matter of law that however regrettable the length of time from the initial sentences to the present may be, there is no violation of any constitutional right.

WHEREFORE, IT IS ORDERED that defendant's motion for post conviction relief be and the same is hereby denied.

IT IS FURTHER ORDERED that defendant's motion for appointment of counsel to represent him in this proceeding be and the same is hereby denied.

Dated this 5th day of May, 1997.

BY THE COURT:

JUDGE

RECORDED
Journal 3745-051
May 5, 1997

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DISTRICT COURT JOURNAL NO. 3743 PAGE 073

WED MAY 07 1997

JANUARY TERM, A.D.

106-055 THE STATE OF NEBRASKA VS CAREY DEAN MOORE
MURDER IN THE FIRST DEGREE - TWO COUNTS (10103)
INFORMATION
Attorney Edward F. Fogarty is appointed to represent the Defendant on his appeal from the order entered May 5, 1997 denying Defendant's motion for post conviction relief.

JAMES A. BUCKLEY, JUDGE

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FILED
DISTRICT OF NEBRASKA
SEP 20 1988 4:44
William L. Olson, Clerk
By

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CAREY DEAN MOORE, Petitioner, vs. HAROLD W. CLARKE, Respondent.	)	CV84-L-754 MEMORANDUM OF DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The report and recommendation of Magistrate David L. Piester, filing 41, carefully reviews the claims of the petitioner and recommends denial of all claims, except that portion of the petitioner's tenth claim which challenges as unconstitutionally vague the application of aggravating circumstance (1)(d) of Neb. Rev. Stat. Section 29-2523. I agree with his analysis and conclusion and add only the following observations with respect to the application of that one aggravating circumstance.

Neb. Rev. Stat. Section 29-2523(1)(d) says that one aggravating circumstance that may be considered in determining whether the death penalty is to be applied is:

> "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

The Supreme Court of Nebraska in affirming the petitioner's death penalty said that this statutory provision:

> "describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the 'pitiless crime which is unnecessarily torturous to the victim' and to cases where torture, sadism, or the imposition of extreme suffering exists. ... In this case the sentencing panel found that aggravating circumstance did not exist. We agree. The second circumstance pertains to the state of mind of the actor. In State v. Stewart, [197 Neb. 497, 250 N.W.2d 849 (1977)], we said the second instance indicates a situation 'where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence' ... and in State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind 'totally and senselessly bereft of any regard for human life' ... . The sentencing panel found the second circumstance did apply.

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We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly bereft of regard for human life: (1) The murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable than a younger life."

State v. Moore, 210 Neb. 457, 470-471, 316 N.W. 2d 33 (1982).

Thus, it is the second prong, the one dealing with the state of mind of the defendant, that was utilized by the sentencing panel in imposing the death penalty.

In Holtan v. Black, CV84-L-393, unpublished memorandum of decision dated November 5, 1986, I said:

"... The problem comes in the second prong of the Nebraska Supreme Court's construction. ...

The words used by the Supreme Court of Nebraska in the second prong relate to the set of the offender's mind. They offer nothing objective, such as torture or other physical abuse, as guidance to a sentencing panel by way of an 'inherent restraint on the arbitrary and capricious infliction of the death sentence.' Godfrey v. Georgia, 446 U.S. at 428. The words of the second prong are not 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Gregg v. Georgia, 428 U.S. at 189. They do not provide the sentencer with 'clear and objective standards' for 'specific and detailed guidance' that may 'make rationally reviewable the process for imposing a sentence of death.' Godfrey v. Georgia, 446 U.S. at 427-28. 'Totally and senselessly bereft of any regard for human life' is no more meaningful to a sentencing panel than 'especially heinous, atrocious, cruel or manifested exceptional depravity ...'"

It is apparent that under Gregg v. Georgia, 428 U.S. 153 (1976), a state supreme court's construction of an ambiguously worded statute may relieve the statute of its unconstitutionality, if the language of that statute is limited by the construction in such a way that the sentencer is given objectively recognizable criteria for applying the statute. The question, then, is whether the Supreme Court of Nebraska has so construed the second prong of the Nebraska's statute.

Four decisions of the Supreme Court of Nebraska before its decision in the petitioner's case used words other than the words

of the statute to describe the second prong of aggravating circumstance (d). In State v. Holtan, 197 Neb. 544, 547, 250 N.W. 2d 876 (1977), the court said:

"... The defendant killed, and attempted to kill, unresisting victims to the robbery. The act was totally and senselessly bereft of any regard for human life." (Emphasis added.)

In interpreting that language the court in State v. Rust, 197 Neb. 528, 539, 250 N.W.2d 867 (1977), said:

"Today in Holtan we have also said that aggravating circumstance (d) exists where the murder is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life." (Emphasis added.)

In State v. Harper, 208 Neb. 568, 579, 304 N.W.2d 663 (1981), the court said:

"... The sentencing court's finding that the murders of Duane Johnson and Chad Shelton were so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life appropriately summarizes the facts of this case." (Emphasis added.)

In State v. Simants, 197 Neb. 549, 566, 250 N.W.2d 881 (1977), the court said this about the second prong of aggravating factor (d):

"... In interpreting this portion of the statute, the key word is 'exceptional.' It might be argued that every murder involves depravity. The use of the word 'exceptional,' however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. We find such depravity was present in the murder of the three females." (Emphasis added.)

Three phrases of the Supreme Court of Nebraska from these opinions may be pointed to as arguably limiting the words of the second prong of aggravating factor (d). They are: (1) "so coldly calculated as to indicate a state of mind totally and senselessly bereft of any regard for human life," (2) "unresisting victims," and (3) "exceptional." The sentencing panel had no other language to guide it as to what constitutes a murder that "manifested exceptional depravity by ordinary standards of morality and intelligence," as set out in the statute.

Of these three phrases only the "so coldly calculated" language was employed by the sentencing panel. Order of Sentencing, filing 39, p. 85.

"So coldly calculated as to indicate a state of mind totally and senselessly bereft of any regard for human life" offers little, if anything, objective in nature. Planning is a part of the standard, but not planning alone. "Cold" planning suggests a lack of emotion. That combination has an aura of objectivity about it. "So," however, ties the emotionless planning to an absence of "any regard for human life," which is altogether subjective. Most troubling is the Nebraska Supreme Court's later definitive analysis in State v. Palmer, 224 Neb. 282, 320, 399 N.W.2d 706 (1986) of the second prong of aggravating factor (d). There it made no mention of emotionless planning tied to an absence of any regard for human life. It said instead:

> "Therefore, for the purpose of s 29-2523(1)(d) as an aggravating circumstance in determining whether the death penalty may be imposed, we hold that 'exceptional depravity' in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. ... Consequently, where one or more of those five factors are present, there may be a finding of 'exceptional depravity' concerning a first degree murder."

The 1986 definition of the second prong of aggravating factor (d) looks nothing like the pre-1986 illustrations.

"Unresisting victims," used in State v. Holtan, supra, may be an objective factor, but the Palmer definition moves from "unresisting" to "helpless." The two are not the same. The sentencing panel in the petitioner's case did not find an unresisting victim in each of the two murders committed by the petitioner, and I gather from the file that it could not have so found with respect to the first murder. "Helplessness" is so general a term that it is fair to say that a reasonable person could conclude that any murder victim was helpless as evidenced by the fact of the murder. "Senselessness of the crime" has no objective meaning; if senselessness of a crime is sufficient to permit a death penalty, it can be granted in virtually any case. The sentencing panel of the petitioner's case made no finding of "apparent relishing of the murder by the killer," or "infliction of gratuitous violence on the victim," or "needless mutilation of the victim."

If the 1986 definition intended to abandon its pre-1986 efforts at guidance, it did not say so distinctly. If it did not so intend, a sentencer now has a series of suggestions, some objective and some not, from which to choose, without assurance that the series is complete.

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The adjective "exceptional," underscored in Simants, is much like "especially," which has been treated and rejected by the Supreme Court of the United States in Maynard v. Cartwright, ____ U.S. ____, 56 U.S.L.W. 4501, 4503, in dealing with a statute similar to Nebraska's first prong:

> "... To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'"

In short, as earnest as the Supreme Court of Nebraska has been in its difficult task to bring Nebraska's statutory language of this aggravating factor into consitutional objectivity, a sentencer is left with only scattered and uncertain fragments for a definition.

The procedure of simply analyzing on appeal the specific facts of the case to determine that they fall within the ambit of the language of the second prong of the aggravating circumstance (d) does not render the ambiguous words of the statute constitutional. The Supreme Court in Maynard v. Cartwright, supra, dealt with that practice. It said:

> "The Court of Appeals, with some care, reviewed the evolution in the interpretation of the 'especially heinous, atrocious, or cruel' aggravating circumstance by the Oklahoma Court of Criminal Appeals up to and including its decision in this case. Its reading of the cases was that while the Oklahoma court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstance, that court had 'refused to hold that any one of those factors must be present for a murder to satisfy this aggravating circumstance.' 822 F.2d, at 1491. Rather, the Oklahoma court simply had reviewed all of the circumstances of the murder and decided whether the facts made out the aggravating circumstance. Ibid. ...
>
> The State, however, takes issue with the Court of Appeals' conclusion that this approach, which was also employed in this case, to interpreting and applying the challenged aggravating circumstance is unconstitutional. It insists that in some cases there are factual circumstances that so plainly characterize the killing as 'especially heinous, atrocious, or cruel' that affirmance of the death penalty is proper. As we understand the argument, it is that a statutory provision governing a criminal case is unconstitutionally vague only if there are no circumstances that could be said with reasonable certainty to fall within reach of the language at issue. Or to put it another way, that if there are circumstances that any reasonable person

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would recognize as covered by the statute, it is not unconstitutionally vague even if the language would fail to give adequate notice that it covered other circumstances as well.

The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. United States f. Powell, 423 U.S. 87, 92-93 (1975); United States v. Mazurie, 419 U.S. 544, 550 (1975); Palmer v. City of Euclid, 402 U.S. 544 (1971)(per curiam); United States v. National Dairy Corp., 372 U.S. 29, 32-33, 36 (1963). Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate court with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)."

To date the dissimilar results in the cases before the Supreme Court of Nebraska, despite that court's attempt at specificity, leave the sentencer to look closely at the facts of each case and to decide whether those facts show enough to lead to a finding that the second prong of aggravating factor (d) is applicable, without restriction beyond the boundless words of the statute. More specificity is required in order for that aggravating circumstance to have a constitutional validity, whether the sentencer is a single judge, a panel of judges, or either with the assistance of a jury.

It follows that, as to that single claim, the petitioner's petition for writ of habeas corpus must be granted.

Harold W. Clarke has become warden of the Nebraska State Penitentiary since this case was filed. Accordingly, he should be substituted as the respondent.

Dated September 20, 1988.

BY THE COURT

United States District Judge

TIME LINE

August, 1997	Moore kills two cab drivers
June 20, 1980	Moore sentenced to death
Jan. 29, 1982	Nebraska Supreme Court rejects Moore's direct appeal, affirms death sentence
May 25, 1984	Nebraska Supreme Court rejects Moore's first post conviction case
Nov. 14, 1984	Moore files only federal petition to date for habeas corpus
Sept. 20, 1988	U.S. District Court for District of Nebraska (J. Urbom) grants Moore's habeas petition; State appeals
May 25, 1990	Eighth Circuit denies State appeal
Dec. 12, 1991	Eighth Circuit denies State's Motion for Rehearing/rehearing en banc
May 18, 1992	State petition for writ of certiorari denied
July 1, 1992	U. S. District Court orders resentencing to commence in 60 days or reduce Moore sentence to life
July 9, 1993	On State's motion to have Nebraska Supreme Court define exceptional depravity and conduct the resentence review, Nebraska Supreme Court does neither
Mar. 27, 1995	Justice Stevens' Lackey Memorandum
April 21, 1995	Three judge panel resentences Moore to death. Moore appeals.
Sept. 27, 1996	Nebraska Supreme Court affirms death sentence.

	Moore seeks certiorari
April 14, 1997	Certiorari denied.
April 30, 1997	Moore files second post conviction motion. Motion raises Lackey
May 5, 1997	Motion denied without hearing. Moore appeals.
April 2, 1999	Nebraska Supreme Court affirms denial of post conviction relief
April 12, 1999	Moore moves for rehearing
April 21, 1999	Nebraska Supreme Court denies rehearing